

No. 10232

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS  
ANGELES,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA, B. Y. TAFT, and B. Y. TAFT  
and ARTHUR T. EARL, as Executors of the Estate of  
Mary Eleanor Taft, Deceased,

*Appellees.*

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## APPELLANT'S OPENING BRIEF.

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*Appellees.*

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## APPELLANT'S OPENING BRIEF.

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### Statement of Pleadings and Facts as to Jurisdiction.

As shown by the complaint filed in the District Court of the United States, in and for the Southern District of California, Central Division, by the plaintiff, United States of America, this action arises under Sections 210 and 211 of the Revenue Act of 1926, c. 27, 44 Stat. 9; Sections 11 and 12 of the Revenue Act of 1928, c. 852, 45 Stat. 791; Section 3186 of the Revised Statutes; and Section 802 of the Revenue Act of 1936, c. 690, 49 Stat. 1648; and was commenced by the direction of the At-

torney General of the United States at the request of the Commissioner of Internal Revenue. [Paragraph II of Complaint, Tr. pp. 2 and 3.] By the Answer of the defendant and appellant, Citizens National Trust & Savings Bank of Los Angeles [Further, Separate and Third Defense to Complaint, Tr. p. 16] it was alleged that the liens claimed by the plaintiff, United States of America, were subordinate to a lien of the defendant Bank and issue was thereby raised involving the interpretation of Revised Statutes, Section 3186, as amended by Act May 29, 1928, c. 852, Section 613, 45 Stat. 875 (U. S. C. A., Title 26, Section 3670), which provides as follows:

“If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. 53 Stat. 448.”

This appeal is taken under the provisions of Section 128 of the Judicial Code (28 U. S. C. A. §225) and pursuant to Rule 73b of the Federal Rules of Civil Procedure [Tr. pp. 45-46], from a judgment in favor of the plaintiff, United States of America, entered upon findings of fact and conclusions of law in favor of the plaintiff, United States of America, and determining the lien of the government to be prior and superior to the lien of the appellant Bank.



### Statement of the Case.

The facts giving rise to this appeal and as shown by the pleadings herein are as follows:

The plaintiff, United States of America, has filed this action under the provisions of Section 3207 of the Revised Statutes (U. S. C. A., Title 26, Sec. 3678), which provides for the enforcement of a lien of the United States for taxes upon any property and rights to property whether real or personal, upon liens asserted by the plaintiff to have arisen against the defendant B. Y. Taft and perfected by the plaintiff during the year 1930-1931. [See Complaint, Paragraphs VI to XVII, Tr. pp. 3-7.]

Subsequent to the perfecting of said liens, as alleged by the plaintiff, and during the year 1938, Mary Eleanor Taft, the mother of the defendant, B. Y. Taft, died, leaving to said B. Y. Taft an undivided one-fourteenth ( $1/14$ ) interest in her estate. [See Stipulation of Facts, Paragraph II, Tr. pp. 17-18.] Subsequent to the appointment of the executors of the estate of Mary Eleanor Taft, deceased, and on or about the 9th day of April, 1938, defendant and appellant, Citizens National Trust & Savings Bank of Los Angeles, levied a writ of execution on all of the right, title, and interest of the said B. Y. Taft in and to the estate of the said Mary Eleanor Taft, deceased, upon an execution issued on a judgment obtained by the Citizens National Trust & Savings Bank of Los Angeles against B. Y. Taft in the amount of \$17,829.00 plus interest as provided by law. [Stipulation of Facts, Paragraph III, Tr. p. 18.] Thereafter and on or about the 20th day of September, 1940, the United States Collector of Internal Revenue for the Sixth Collection District of California levied a warrant of distraint upon said property

and rights to property of said B. Y. Taft in the possession of the executors of the estate of Mary Eleanor Taft, deceased, by making demand upon said executors for the immediate surrender of such property, rights to property, money, or credits as were determined by the Court to be properly distributable to said B. Y. Taft. Said notice and demand served upon the executors as aforesaid was the only notice and demand of the plaintiff herein to the right, title, and interest of said B. Y. Taft in and to the estate of said Mary Eleanor Taft, deceased, other than the said liens recorded as alleged in plaintiff's complaint. [Stipulation of Facts, Paragraph IV, Tr. pp. 18-19.] The matter was submitted for decision by the Court upon the complaint, the answers of B. Y. Taft and of B. Y. Taft and Arthur T. Earl, as executors, and of the defendant Citizens National Trust & Savings Bank of Los Angeles, and upon the Stipulation of Facts set forth in the transcript, pages 17 to 20, upon the issue as to the priority of liens as between the plaintiff, United States, and the defendant, Citizens National Trust & Savings Bank of Los Angeles, it being the contention of the Citizens National Trust & Savings Bank that the lien claimed by the plaintiff, United States, and alleged to have arisen in 1931 did not attach to the interest of the said B. Y. Taft in and to his mother's estate as said interest was after-acquired property and therefore not subject to the lien of the Government and that no lien arose in favor of the Government until the distraint proceeding in 1940, at which time the plaintiff, United States, by such distraint proceedings took only the right, title, and interest which the defendant B. Y. Taft then had in said estate and which was then subject to the lien of the defendant Citizens National Trust & Savings Bank of Los Angeles.

The trial Court, following the submission of the case, decided the issues in favor of the plaintiff, United States, and thereupon made its findings of fact and conclusions of law wherein it found the facts to be as hereinabove set forth and as conclusions of law determined that the tax liens of the Government attached to all property and rights to property acquired by the taxpayer, B. Y. Taft, subsequent to December 5, 1930, and August 21, 1931, the dates upon which said tax liens arose, including the undivided one-fourteenth ( $1/14$ ) interest given him by will in the estate of Mary Eleanor Taft, deceased [Conclusions of Law, Paragraph III, Tr. p. 39], and further that said liens have been at all times since 1931, and now are, good, valid, and effective against all persons [Conclusions of Law, Paragraph IV, Tr. p. 39], that the defendant, Citizens National Trust & Savings Bank of Los Angeles acquired a lien upon B. Y. Taft's one-fourteenth ( $1/14$ ) interest in the estate of Mary Eleanor Taft, deceased, on the 9th day of April, 1938, but that said lien was junior, subordinate, and inferior to the liens of the United States for the 1926, 1927, 1928 income taxes of said B. Y. Taft [Conclusions of Law, Paragraph V, Tr. p. 40], and that the liens of the United States are superior and paramount to the rights of the defendant, Citizens National Trust & Savings Bank of Los Angeles in or to the one-fourteenth ( $1/14$ ) interest of B. Y. Taft in the estate of Mary Eleanor Taft, deceased [Conclusions of Law, Paragraph VI, Tr. p. 40]; and thereupon made and caused to be entered a decree herein in accordance with said conclusions of law [Decree, Tr. pp. 42-44].



### Specification of Errors.

It is submitted by the appellant, Citizens National Trust & Savings Bank of Los Angeles, that the trial court erred in each and all of the following particulars:

1. In determining that as a matter of law under the provisions of the laws of the United States relating to liens of the Government for taxes and particularly under the provisions of Revised Statutes, Section 3186 as amended by Act May 29, 1928 (U. S. C. A., Title 26, Section 3670), the lien of the Government for taxes attaches to after-acquired property of the tax debtor.

2. In determining that as a matter of law, under said statutory provision, the tax liens claimed by the plaintiff, United States, attached to all property and rights to property acquired by the taxpayer, B. Y. Taft, including an undivided one-fourteenth ( $1/14$ ) interest given him by will in the estate of Mary Eleanor Taft, deceased, subsequent to December 5, 1930, and August 21, 1931, the dates upon which said tax liens arose, and in determining that said liens have been at all times since and now are good, valid, and effective as against all persons.

3. In determining that as a matter of law, under said statutory provision, the lien of the defendant, Citizens National Trust & Savings Bank of Los Angeles, upon the interest of B. Y. Taft in the estate of Mary Eleanor Taft, deceased, is junior, subordinate, and inferior to the liens of the United States for the 1926, 1927, 1928 income taxes of said B. Y. Taft, and that the liens of the United States for said income taxes are superior and paramount to the rights of any and all of the defendants herein and particularly of the defendant Citizens National Trust &

Savings Bank of Los Angeles in or to the one-fourteenth (1/14) interest of said B. Y. Taft in the estate of Mary Eleanor Taft, deceased.

4. In determining that as a matter of law, under said statutory provisions, the plaintiff, United States of America, is entitled to an order for the sale of said B. Y. Taft's undivided one-fourteenth (1/14) interest in and to the estate of Mary Eleanor Taft, deceased, under the said liens of the United States, and that the proceeds of such sale be applied upon said taxes prior to their application toward payment of the lien of the defendant Citizens National Trust & Savings Bank of Los Angeles.

### **Statutory Provisions Involved and Statement of Appellant's Contentions.**

The provisions of the Federal statutes relating to the lien of the United States for taxes and the statutory authority for the enforcement of payment of taxes are as hereinafter set forth. Upon the construction and interpretation of these statutory provisions depends the determination of the issues raised between the Government and the appellant Bank in the instant case.

R. S., Section 3186(a) as amended by Act May 29, 1928, c. 852 (U. S. C. A., Title 26, Sections 3670 and 3671) provides:

“If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. 53 Stat. 448.



“Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of the lapse of time. 53 Stat. 449.”

R. S., Section 3186(b) (U. S. C. A., Title 26, Section 3672) provides that

“such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—(1) In accordance with the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law provided for the filing of such notice; . . .”

Subsequent sections provide for the release of the lien and for partial discharge of property.

R. S., Section 3207(a), as amended by Acts June 19, 1934, c. 651, 48 Stat. 1064; June 22, 1936, c. 690, Section 802(a), 49 Stat. 1743 (U. S. C. A., Title 26, Sec. 3678) provides as follows:

“In any case where there has been a refusal or neglect to pay any tax, and it has become necessary to seize and sell property and rights to property, whether real or personal, to satisfy the same, whether distraint proceedings have been commenced or not, the Attorney General at the request of the Commissioner may direct a civil action to be filed, in a district court of the United States, to enforce the lien of the United States for tax upon any property and rights to property, whether real or personal, or to subject any such property and rights to property

owned by the delinquent, or in which he has any right, title, or interest, to the payment of such tax.

“All persons having liens upon or claiming any interest in the property or rights to property sought to be subjected as aforesaid shall be made parties to such proceedings and be brought into court.

“The said court shall, at the term next after the parties have been duly notified of the proceedings, unless otherwise ordered by the court, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property and rights to property in question, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property and rights to property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States.

“\* \* \* \* \*

In addition to the foregoing provisions relating to liens and enforcement thereof further provisions have been made for collection by distraint proceedings. These statutory provisions are as follows:

R. S., Section 3187, which was in nature of a revision of Act July 13, 1866, c. 184, Section 9, 14 Stat. 106, 107, 108; Mar. 2, 1867, c. 169, Section 8, 14 Stat. 473; as amended by Act June 2, 1924, c. 234, Section 1016, 43 Stat. 343 (U. S. C. A., Title 26, Sec. 3690), provides:

“If any person liable to pay any taxes neglects or refuses to pay the same within ten days after notice and demand, it shall be lawful for the collector or his deputy to collect the said taxes, with such inter-

est and other additional amounts as are required by law, by distraint and sale, in the manner provided in this subchapter, of the goods, chattels, or effects, including stocks, securities, bank accounts, and evidences of debt, of the person delinquent as aforesaid. 53 Stat. 451.”

R. S., Section 3188, which was in nature of a revision of Act July 13, 1866, c. 184, Section 9, 14 Stat. 107 (U. S. C. A., Title 26, Sec. 3692) provides:

“In case of neglect or refusal under section 3690, the collector may levy, or by warrant may authorize a deputy collector to levy, upon all property and rights to property, except such as are exempt by the preceding section, belonging to such person, or on which the lien provided in section 3670 exists, for the payment of the sum due, with interest and penalty for nonpayment, and also of such further sum as shall be sufficient for the fees, costs, and expenses of such levy. 53 Stat. 452.”

R. S., Section 3194, which was in nature of a revision of Acts July 13, 1866, c. 184, Section 9, 14 Stat. 107; June 30, 1864, c. 173, Section 45, 13 Stat. 240 (U. S. C. A., Title 26, Sec. 3697) provides:

“In all cases of sale, as aforesaid, the certificate of such sale shall be *prima facie* evidence of the right of the officer to make such sale, and conclusive evidence of the regularity of his proceedings in making the sale; and shall transfer to the purchaser all right, title, and interest of such delinquent in and to the property sold; . . . 53 Stat. 453.”

Under the foregoing provisions relating to the lien of, and methods of collection of a Federal tax, and particu-

larly under the provisions of Section 3186(a), R. S., it was the contention of the plaintiff, United States of America, that the lien for taxes which arose and was perfected by the plaintiff against B. Y. Taft in 1930-31 was in the nature of a continuing lien and attached to all property subsequently acquired by said B. Y. Taft at the instant title vested in Taft so that the lien of the Government would be prior to any lien thereafter attaching against such property in favor of any third persons.

It is the contention of appellant Bank in the instant case that the lien given the United States under the statutory provisions hereinabove set forth is purely a statutory lien and is limited strictly to the right given by the language of the statute; that the provisions of Section 3186(a) R. S., create a lien only on property or rights to property owned by the taxpayer at the time the lien is perfected; that the said lien becomes in effect a judgment in favor of the United States which gives the United States the right to pursue property which may be after-acquired either by a proceeding under R. S., Section 3207(a) as in the instant case, or by distraint proceedings under the statutory provisions relating to distraint, hereinabove set forth, but that the claim of the Government which may be established thereby, takes effect only at such time as either of these proceedings is commenced to establish the lien against any right which a tax debtor may have in after-acquired property. That the lien thereby established does not relate back to the date of the original lien so as to cut off the rights of intervening credi-



tors or other third parties, acquired as against said after-acquired property prior to the time when the Government seeks to enforce its lien either by Court action or by distraint proceedings. In the instant case, therefore, the distraint proceedings by the Government instituted in 1940, while they may be held effective as creating a lien in favor of the United States at that time, gave the Government a lien only on the right, title, and interest which B. Y. Taft then had in the interest of his mother's estate and which was then subject to the right of the appellant Bank under its execution lien created in 1938.

**The Lien Created by the Provisions of R. S., Section 3186(a) Is Purely a Statutory Creation and Is in Effect a Judgment in Favor of the United States Against the Tax Debtor.**

It cannot be disputed that the lien provided in Section 3168(a), R. S., is purely a statutory lien. This rule seems to be well recognized in all cases dealing with the interpretation of the Federal Statutes relating to liens, and being a statutory lien its character, operation, and extent must be ascertained from the terms of the statute. It was said in the case of *United States v. Beaver Run Coal Co.*, 99 Fed. (2d) 610, at page 612, in referring to certain of the statutes involved herein:

“Whether a statute creating a lien is to be given a liberal or a strict construction, it is well established that ‘the character, operation and extent of the lien must be ascertained from the terms of the statute



which creates and defines it, and the lien will extend only to persons or conditions provided for by statute, and then only where there has been at least a substantial compliance with all the statutory requirements.' 37 C. J. 309, 322, 323; *In re Brunquest*, 4 Fed. Cas. p. 482, No. 2,055; *The Suelco*, D. C., 286 F. 286; *Gile v. Atkins*, 93 Me. 223, 44 A. 896, 74 Am. St. Rep. 341. Positive legislative enactments prescribing conditions essential to the existence and preservation of a statutory lien cannot be disregarded. *Augustine v. Congregation of Holy Rosary of Pompeii*, 213 Wis. 517, 252 N. W. 271."

The general rule as to the construction of statutory liens is found in 33 *Am. Jur.*, 432 (Liens), Sections 25 and 26. The language therein contained is as follows:

"25. Validity.—Liens created by statute are ordinarily governed by and find their efficacy within the provisions of their foundation, and their validity is entirely dependent on the terms of the statute. It is within the power of the legislature to provide for liens to secure the payment of debts and other obligations, subject to constitutional limitations. . . .

"26. Construction and Application of Statutes.— . . . It may here be stated generally that where a lien is provided for by a statute which is merely declaratory of the common law, it must be interpreted in conformity with its principles. On the other hand, where the legislature has enlarged and defined a common-law lien, its definition supersedes the definition of the courts, and thereafter, the exercise of the

powers of the courts with respect to such liens must be consistent with the legislative definition. *A lien created by statute is limited in operation and extent by the terms of the statute, and can arise and be enforced only in the event and under the facts provided for in the statute; it cannot be extended by the courts to cases not provided for by the statute, nor can it be substituted by a bond. . . .*" (Emphasis ours.)

It was held in the case of *Bull v. United States*, 55 Sup. Ct. 695, 295 U. S. 247, that the assessment made by the Collector is given the force of a judgment, the Court saying:

" . . . The assessment supersedes the pleading, proof, and judgment necessary in an action at law, and has the force of such a judgment. The ordinary defendant stands in judgment only after a hearing. The taxpayer often is afforded his hearing after judgment and after payment, and his only redress for unjust administrative action is the right to claim restitution. But these reversals of the normal process of collecting a claim cannot obscure the fact that after all what is being accomplished is the recovery of a just debt owed the sovereign."

The Lien Created by the Provisions of R. S., Section 3186(a) Is Limited by its Terms and Does Not Extend to Property Acquired by the Taxpayer after the Lien Arises; However, Under the Provisions of R. S., Section 3207(a) (U. S. C. A., Title 26, Sec. 3678) and R. S., Section 3188 (U. S. C. A., Title 26, Sec. 3692), the Government May Seek After-acquired Property of a Tax Debtor by Court Action or Distraint Proceedings.

Having in mind the foregoing provisions with reference to the construction of a statutory lien, let us examine the statutes hereinbefore set forth relating to the enforcement and collection of tax levies. Section 3186(a), it will be noted, provides only that the tax due "shall be a lien in favor of the United States upon all property or rights to property whether real or personal belonging to such person" and further, that "unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the Collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time." There is no provision in this statute that the lien shall extend to property acquired after the lien shall arise or that the lien shall extend to all property belonging to such person or thereafter acquired by him within the period of limitation. This statute provides only that the lien shall attach to property owned by the taxpayer at the time the lien arises, and will be a lien against that property until the tax is satisfied, or until the limitation of

time within which the tax may be collected has expired. Had Congress intended that the lien provided for in said section was to extend to after-acquired property of the tax debtor, it would have been a very simple matter to have written this into the statute. In thus failing to provide in Section 3186(a) (U. S. C. A., Section 3670) that the lien should attach to after-acquired property, Congress undoubtedly believed that in enacting this statute and the subsequent sections relating to distraint proceedings and enforcement by civil action, sufficient means had been provided by which after-acquired property of a tax debtor could be reached and subjected to the payment of the tax.

In R. S., Section 3207(a) (U. S. C. A., Title 26, Section 3678), which provides for the filing of a civil action in the District Court, such as the action in the instant case, it will be noticed that that statute provides,

“that the Attorney General at the request of the Commissioner may direct a civil action to be filed, in a District Court of the United States, to enforce the lien of the United States upon any property and rights to property whether real or personal *or to subject any such property or rights to property owned by the delinquent, or in which he has any right, title or interest to the payment of such taxes,*” (Emphasis ours.)

and further provides

“that all persons having liens upon or claiming any interest in the property or rights to property sought to be subjected as aforesaid shall be made parties to such proceedings and be brought into Court.”



This provision gives the Government a right to pursue assets which may not have been subject to the lien at the time the lien arose and also shows that Congress recognized that the property sought to be subjected might have prior claims or liens against it. Again in R. S., Section 3188 (U. S. C. A., Title 26, Section 3692), it is provided that,

“the Collector may levy by distraint upon all property and rights to property belonging to such person, *or on which the lien provided in Section 3670 exists.*”  
(Emphasis ours.)

and further R. S., Section 3194 (U. S. C. A., Title 26, Section 3697) provides that where a sale has been made by the Collector upon such distraint the certificate shall

“transfer to the purchaser all right, title, and interest of such delinquent in and to the property sold.”

Here again Congress recognizes that there may be property belonging to the taxpayer which is not subject to the lien, and which may be seized by distraint, but recognizes that the Government can take only the right, title and interest then owned by the tax debtor.

Under the foregoing provisions it is clear that Congress has provided the tax collector with appropriate means to reach after-acquired property of a tax debtor, at the same time recognizing that at the time the Collector distrains or a Court action is commenced there may be rights of other parties which have attached to the property, or rights to property, of the tax debtor.



Where After-acquired Property Is Levied Upon by Distraint Proceedings or a Court Action Is Brought to Enforce Payment From After-Acquired Property, the Lien of the Government Does Not Relate Back to the Date the Original Lien Was Perfected and the Government's Claim Against Such After-Acquired Property Is Subject to Intervening Rights of Third Persons.

Numerous cases hold that the lien of the Government under the foregoing provisions may be subordinate to prior liens. Among these are the following:

*Sherwood et al. v. United States*, 5 Fed. (2d) 991 (where the lien of the Government was held to be subordinate to a prior mortgage);

*Oden v. United States*, 33 Fed. (2d) 553 (which held that foreclosure of a prior mortgage wiped out the Government's claim against specific property); and,

*Minnesota Mutual Life Insurance Co. v. United States*, 47 Fed. (2d) 942 (holding that a junior lien of the Government is subject to being quieted by a prior lienor).

The early case of *Stiles v. Murphy*, 4 Ohio Reports 92, 93, decided in 1829, contains language which counsel believe pertinent to the interpretation of the Federal Statutes hereinbefore referred to. In that case the question was whether a lien of a judgment attaches to after-acquired lands so as to affect the rights of a purchaser. The Court states that the question presented was decided by the Court in the case of *Roads v. Symmes* in 1 Ohio Reports, 313, but decided that a more particular examination of the question was necessary. The facts in that

case were that a judgment was recovered in June, 1822, against N. On September 4, 1822, N acquired title to the land in question. January 27, 1823, N executed a mortgage to the plaintiff's predecessor. In March, 1825, an execution was taken out on the judgment and levied upon the land, and in February, 1829, the land was sold on the execution to the defendant, which sale was confirmed and a deed was executed by the Sheriff to the defendant who claimed under it. In 1825 action was taken upon the mortgage and a judgment of execution was rendered on January 5, 1825. A levy was first made in connection with the mortgage on the property on January 1, 1828. On February 21, 1829, the property was sold to plaintiff's predecessor and the sale was confirmed and a deed executed under which plaintiff's predecessor claims. In its decision, the Court says:

“Upon a careful examination of all the authorities within our reach, the point under consideration does not appear to have been solemnly adjudged, upon full investigation, either in England or in our own country, except in Pennsylvania. Our researches have furnished but little light upon the question, and it seems not much less distinct in the mists of antiquity than in our own day. We would appear, then, to violate no settled principle, in analogous cases, by giving to our statute the construction which our circumstances and policy require. With us, the judgment creditor's lien upon the debtor's land, the right to sue, and the manner of transferring to the purchaser, are all matters of statutory regulation. The statute declares that ‘the lands and tenements of the debtor shall be bound for the satisfaction of any judgment against such debtor, from the first day of the term at which judgment shall be rendered.’ The writ of

*feri facias* 'shall command the officer to whom it is directed, that of the goods and chattels of the debtor, he cause to be made the moneys specified in the writ; and for want of goods and chattels, he cause the same to be made of the lands and tenements of the debtor.' It is provided in section 11 of the same act, 'that the sheriff, or other officer, who, by such writ, or writs of execution, shall sell the said lands and tenements so levied upon, or any part thereof, shall make to the purchaser or purchasers as good and sufficient a deed of conveyance for the lands and tenements so sold as the person or persons, against whom such writ or writs of execution were issued, might or could have made for the same, at any time after said lands become liable to said judgment, which deed shall be *prima facie* evidence of the legality of such sale, and the proceedings thereon, until the contrary be proved, and shall vest in the purchaser as good and as perfect an estate, in the premises therein mentioned, as was vested in the party, at or after the time when the said lands and tenements became liable to the satisfaction of the said judges.' 22 Ohio L. 108. The legislature, in giving judgments on a lien, had particularly in view the lands that the debtor held at the time when the judgment was rendered. They clearly intended the judgment should attach to these, so that a purchaser would hold them *cum onere*. The execution, according to its command, was not only intended to embrace lands upon which the judgment was a lien, but those held by the debtor at the time the execution was issued and a levy made. The command of the *fi. fa.* certainly does not embrace, in terms or literally, the lands acquired at any time posterior to the judgment, but which had been aliened before the execution issued. Such can not, with strict propriety, be said to be the 'lands of the debtor.'



They were not the lands of the debtor, and, therefore, not 'bound by the judgment.' The deed of conveyance shall be as good and sufficient as the debtor could have made at any time after the said lands became liable to the said judgment. According to our construction, the lands held by the debtor, when the judgment was rendered, as well as the lands held at the time of issuing the execution, are 'liable to judgment,' and to 'the satisfaction of the judgment.' The legislature has defined more explicitly the deed of the sheriff, and the effect of it. In giving the lien of the judgment, in the command of the *feri facias*, in the definition of the sheriff's deed, and in declaring its effect, the legislature has guarded the terms employed in the most cautious manner, to save lands of the debtor, purchased after the judgment, and aliened before execution. This inference is most strongly deduced from the command of the *feri facias*. If we are to arrive at the law of the court from the form of the *elegit*, we may surely, with equal propriety, infer the intention of the legislature, from the command of the *feri facias*, as given in the statute. It is a matter of history that this law was drafted by learned counsel, appointed as a committee of revision, who were undoubtedly exactly acquainted with the form of the *elegit*. We can not but presume many members of the legislature, who passed it, were intimately acquainted with the common and statute law touching executions. It must have been well known that the *elegit*, in form, extended itself to a moiety of all lands of the debtor, held at the date of the judgment, or of which he had been seized at any time since. If such had been the intention of the legislature, they would have framed their execution accordingly."

It is submitted that in the determination of the instant case the rule laid down in the foregoing citation applies equally well to the Federal Statutes involved herein. The Federal Statute creating the lien (R. S. 3186(a)) gives, in effect, a judgment in favor of the Government against the taxpayer, which judgment thereupon becomes a lien upon all property owned by the taxpayer at the time the lien or judgment arises, while the statutes giving the right to the Government to levy on property by distraint proceedings, or by a court proceeding to subject property to payment of the tax, are in effect the same as the "*feri facias*" referred to in the *Stiles* case.

The only Federal cases which research of counsel has found which involved issues similar to the instant case, are the early case of *U. S. v. Pac. R. R. Company*, 1 Fed. 97 (1880), and *U. S. v. Long Island Drug Company*, 115 Fed. (2d) 983 (2d Circuit, 1940), both of which cases are mentioned and referred to by Judge Harrison in his opinion in the instant case.

While it is true that the case of *U. S. v. Pac. R. R. Company* (*supra*), arose in 1880 and was decided prior to the amendment to the Internal Revenue law by the addition of R. S., Section 3186(b) (U. S. C. A., Title 26, Section 3672) (which amendment provided that the lien of the Government should not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed); counsel believes the language therein contained to be as decisive in a determination of the instant case as it was in determining the issues then before the Court. The provision of the Federal law at that time, giving the Government a lien against the taxpayer, was in most respects similar to the provision as it reads at



present, particularly in that it gave a lien upon all property and rights to property belonging to the taxpayer. The Court in that case was confronted with the determination of the question as to the meaning of the words, "upon all property and rights of property." The language of the Court in determining the question is as follows:

"In considering the demurrer we are called upon to construe the statute under which the lien is claimed. This statute is found in the act of July 13, 1866 (14 Stat. 107), and is also embodied in section 3186 of the Revised Statutes. and is as follows:

" 'And if any person, bank, association, company, or corporation, liable to pay any tax, shall neglect or refuse to pay the same after demand, the amount shall be a lien in favor of the United States, from the time it was due until paid, with the interest, penalties and costs that may accrue in addition thereto, upon all property and rights to property belonging to such person, bank, association, company or corporation.'

"The question is as to the meaning of the words 'upon all property and rights to property belonging to such person, bank, association, company or corporation.' Does the language apply to the property belonging to the Pacific railroad when the taxes accrued, or only to that belonging to that company when the demand by which the lien was created was made? \* \* \*

"\* \* \* In my opinion the language of the statute does not require the construction contended for by counsel for the government. If congress had intended to make the statute so far-reaching as to subject property in the hands of innocent purchasers, who become owners years before any step was taken by the gov-

ernment to assert its lien, this intention would have been plainly expressed. Such, however, is not the case. Let us examine the phraseology: 'If any person, . . . liable to pay a tax, shall neglect or refuse to pay the same after demand, the amount shall be a lien in favor of the United States from the time it was due until paid, . . . upon all property, etc., belonging to such person,' etc. The statute does not say 'Upon all property which may have belonged to such person when the tax accrued.'

"This or similar language would, I think, have been employed if congress had intended to give the statute this effect. It must be conceded that the words 'all property . . . belonging to such person' must be construed as referring to some time to be ascertained by the context; and it may also be conceded that we might, without doing violence to the language of the law, refer them to the time when the tax became due, and make the clause read 'all property, etc., belonging to such person, etc., at the time the tax became due.' This, however, does violence to the spirit of the act for reasons already stated. Another reading is authorized by the language, and is in harmony with the spirit, and that is the one I have adopted, namely, that the words in question refer to the time when the demand is made, and may be phrased thus: 'All property, etc., belonging to such person at the time such demand is made.' By this construction the lien, when it once attaches, relates back to the time when the tax was due, but it does not attach to the property transferred to innocent purchasers prior to demand.

"\* \* \* Nor is (this view) unjust toward the government, for it is fair to presume that the government, armed as it is with so many agencies and

appliances for ascertaining what taxes are due and unpaid, and from whom, and all-powerful as it is to enforce its rights, will, within reasonable time, make demand, or take some steps in the direction of making collections, in all cases where there is delinquency. The government may protect itself by diligence if the view I take of the statute shall prevail; but, if the opposite view is sustained, the citizen who purchases real estate is absolutely without protection against possible liens for taxes of this character.”

There will be noted from the foregoing that the learned Judge who wrote the opinion states, “It must be considered that the words ‘all property . . . belonging to such person’ must be construed as referring to some time to be ascertained by the context,” and therein determined that the words in question refer “to the time when the demand is made.”

The learned Judge further points out that to thus hold is not unjust toward the government for it is fair to presume that the Government, armed as it is with so many agencies and appliances for ascertaining what taxes are due and unpaid and all-powerful as it is to enforce its rights, will, within reasonable time, make demand or take some steps in the direction of making collections in all cases where there is a delinquency and that the Government may protect itself by diligence.

The holding in the *U. S. v. Pacific R. R.* case (*supra*) to the effect that rights which do not exist at the time of the demand upon the taxpayer are not subjected to any claim, is followed in the case of *U. S. v. Long Island Drug Co.* (*supra*), decided by the Second Circuit Court of Ap-



peals, December 16, 1940. That case was an appeal from a decision of the District Court of New York reported in *29 Fed. Supp.* 737, decided in 1939. In the *Long Island Drug Co.* case, the facts were that the Commissioner of Internal Revenue assessed a distilled spirit tax against Charles J. Steinberg in the amount of \$8,393.55. This assessment was made on the May, 1933, list which was signed July 1, 1933, and received in the office of the Collector of Internal Revenue on or about July 6, 1933. Notice and demand was made on Steinberg on July 14, 1933, and a warrant of distraint was issued on September 16, 1933. On April 15, 1936, a notice of lien in the amount of \$11,274.79 was filed in the office of the Clerk of the United States District Court and in the office of the Registrar of Queens County, and on the same date notice of levy, copy of the notice of lien and of the warrant of distraint was served on the defendant, Long Island Drug Co. On June 17, 1936, another notice of lien was filed for additional sums which had accrued and on the same date a notice of lien in the amount of \$11,711.68 was served on defendant, Long Island Drug Co. Finally on March 7, 1939, the Long Island Drug Co. was served with a notice of levy in the sum of \$12,777.65, a copy of the warrant of distraint, and a final demand for the surrender of said amount of money, credits, property, and property rights belonging to Steinberg and in possession of the Long Island Drug Co.

The Government in this proceeding filed an action to enforce the statutory liability against the defendant Long Island Drug Co. Inc., the complaint setting forth that on or about March 7, 1939, the defendant, Long Island Drug Co. Inc., was in possession of property or rights to



property of Charles J. Steinberg in an amount of \$12,-777.65, subject to distraint, that when the notice of levy was served, the defendant Charles J. Steinberg was an officer of the defendant Drug Company, that the defendant Drug Company failed and refused to comply with said levy and demand and failed and refused to surrender any of such property or rights to property, to-wit, \$12,-777.65. The answer of the defendant Drug Company did not deny the service of the notice, nor that it failed and refused to comply with said levy and demand but it did deny that on the date of the service of the notice on March 7, 1939, it was in possession of property or rights to property of C. J. Steinberg subject to distraint. Reading at page 739 of 29 Fed. Supp., the Court then says:

“The first affirmative defense in the answer states that at all the times mentioned Steinberg was employed by the Company and as such was entitled to his salary for his services; that the United States, acting on the assessment mentioned in the complaint, had previously served on the Company notices of levy and demand to turn over Steinberg’s money; that at that time the Company owed Steinberg nothing and had none of his property; that the United States then advised the Company that these notices affected all salary thereafter owed by the Company to Steinberg; that thereafter the Company, Steinberg and Steinberg’s wife agreed that from time to time the Company would lend to Steinberg’s wife, and Steinberg would guarantee the repayment of these loans by applying all his salary thereafter earned toward such repayment; that thereafter the Company loaned to Steinberg’s wife more than Steinberg’s salary; that the ‘alleged credit referred to in paragraph 3 of the complaint’ was merely the Company’s book

entries showing Steinberg's total salary since the agreement 'so made and entered for convenience because of the assertion of the Collector of Internal Revenue that the notice referred to in paragraph fourth hereof was effective against salaries that might be earned after the date of its service.' "

A motion for judgment on the pleadings was then made by the Government and the District Court in the opinion reported in 29 Fed. Supp. 737 granted said motion in all respects. The opinion of the trial court as to the effect of the lien of the Government on after-acquired property was in essence the same as the opinion of the trial Judge in the instant case, the Court there stating at page 740 (29 Fed. Supp.) as follows:

"In the instant case defendant has likewise sought to raise the question, by its first defense, whether it had property of the taxpayer Steinberg within the meaning of the statute. The denial that it had such property is sought to be fortified by the ultimate facts of the first defense heretofore mentioned. But the facts fail to disclose any defenses and equities of the Company pertaining to the property of Steinberg sufficient to defeat the government's paramount claim thereto. There is a fatal admission that the agreement relied upon was entered into after the notices of assessment, lien, levy and demand were served upon the Company. The assessment list when received by the Collector of Internal Revenue acted as a lien and had the same force and effect of a judgment, and continued effective and enforceable thereafter until Steinberg's liability was satisfied. 26 U. S. C. A., Sections 1560, 1561. *Bull, Executor, v. United States, supra*. No equity that the Company could assert against Steinberg's salary arose by virtue of any legal situation existing prior to the operative

facts which attached the government's lien to such salary, and the Company was at all times apprised of the existing claim of priority. The purpose of the statute is not to be thwarted by the absence of a clearly defined moment when the lien may be said to have attached to the property in issue. Cf. *United States v. Canfield*, 29 F. Supp. 734 (United States District Court for the Southern District of California, decided July 24, 1939; C. C. N. Tax Service, Section 9841). The moment is fixed in the setting of the occasion to give prior validity to the government's lien in the property of the taxpayer as against any rights of the defendant Company under facts in the nature here presented. To hold otherwise the purpose of the statute as heretofore stated will be easily defeated, and sanction would be given to a simple evasion device. The first defense, therefore, is insufficient as a matter of law."

The Circuit Court of Appeals having before it the same facts and presumably the opinion of the lower court, expressing the opinion which we have hereinabove quoted, adopted a different and contrary view, reversing the holding of the trial Judge on the ground that at the time of the levy in March, 1939, the defendant Drug Co. had no property or rights to property belonging to the defendant Steinberg by reason of the facts set forth.

With reference to after-acquired property the Hon. Augustus N. Hand says in his decision reported in 115 Fed. (2d) 983, reading at page 986:

"Though we shall assume that a salary or wages which have been earned may be made subject to a lien for unpaid taxes and also subject to distraint and levy, the situation in respect to future earnings



is quite different. They are contingent upon performance of a contract of service and represent no existing rights of property. They are quite distinguishable from the right of a *cestui que* trust whose equitable life estate may be subjected to a lien on behalf of the government for unpaid taxes. *Matter of Rosenberg's Will*, 269 N. Y. 247, 199 N. E. 206, 105 A. L. R. 1238; *United States v. Canfield*, 9 Cir., 29 F. Supp. 734. In the same way they are distinguishable from a taxpayer's interest in an insurance policy upon his life, *Kyle v. McGuirk*, 3 Cir., 82 F. 2d 212; *Cannon v. Nicholas*, 10 Cir., 80 F. 2d 934. Neither right of the taxpayer is contingent but is a fixed right to realize property or income derived therefrom dependent upon no future performance. Rights which do not exist at the time of the demand upon the taxpayer are not subjected to any lien. *United States v. Pacific R. R.*, C. C. Mo., 1 F. 97. Here there was no showing that the taxpayer had any claim against the Drug Company when the demand upon him for payment was made.

"On April 15, 1936, when the Collector served its first notice of lien and demand on the Long Island Drug Company, Inc., nothing was due Steinberg from the Company but he then owed the latter \$4,-711.13. Between that date and March 7, 1939, when the second demand was made on the Company, a contract had been made by it with Steinberg whereby any indebtedness of Steinberg, as surety, might be applied to sums becoming due for his salary. There was an indebtedness of Steinberg at the time of such demand which had been set off pursuant to the agreement.

"In the absence of a statute to the contrary, it is the usual rule that a garnishment does not affect



future earnings or salary. *Savings Bank of Danbury v. Loewe*, 242 U. S. 357, 37 S. Ct. 172, 61 L. Ed. 360. Moreover, there would seem to be no justice in depriving the garnishee of its right to set off which, so far as the record shows was acquired for a valuable consideration before the demand was made on the Drug Company by the Collector. Both on April 15, 1936, when payment was first demanded of the Drug Company, and on March 7, 1939, when the last demand was made, the latter owed no debt to Steinberg upon which distraint could be made. We find nothing in Section 3690 or Section 3710 which varies the general rule that a garnishee process is not to be extended to future earnings, but will only reach an indebtedness which has accrued.

“It appears from the foregoing that there was no lien upon any earnings of Steinberg on April 15, 1936, or accruing thereafter, and that he had no accrued earnings upon the dates upon which a levy was attempted. Accordingly the Long Island Drug Company, Inc., had no property which it could be required to surrender by reason of the provision of 26 U. S. C. A. Int. Rev. Code, Section 3710.”

Had the Circuit Court in the *Long Island Drug Company* case adopted the construction as to liens given by the trial court, or had it followed the same reasoning as the trial Judge in the instant case, certainly it could not have reached the conclusion which it did, for, under the theory of the trial Judge, the earnings of the tax debtor being property, the lien of the Government would have attached at the instant they became due to him and the rights of the Long Island Drug Company to the earnings would have been subject to the claim of the Government.

Counsel for appellant feel that the *Long Island Drug Company* case, *supra*, decided in 1940 under the same statutes relating to the government's lien for taxes confronted in the instant case, is decisive of the question presented in the instant appeal, that the lien of the Government as to after acquired property does not attach until such time as distraint proceedings or a creditor's suit to establish a lien have been made effective by the Government, and does not relate back to the date of the original lien.

### Conclusion.

In the instant case the property of the tax debtor involved consists of an interest in his mother's estate. This interest did not arise until the date of her death in 1938 and then the only interest that the tax debtor acquired was under the will of the deceased. Clearly, therefore, in 1930 and 1931 when the Government perfected a tax lien against the debtor under the provisions of R. S. 3186(a), the lien did not attach and could not attach to this property. The first claim that the Government made against this property was by the distraint proceeding in 1940 and it is submitted that under the holdings in the *Pacific R. R. Company* and the *Long Island Drug Company* cases, *supra*, the lien did not attach to the interest in the estate under the provisions of said statute and that any interest or claim of the Government arose only by virtue of the levy of distraint proceedings at which time the interest of the tax debtor in said estate was subject to the claim of appellant bank under its execution which had been levied in 1938 shortly after the interest arose.

To reason thus and to hold in accordance therewith does no injustice to the Government for it is armed with a great many more means of finding and obtaining property

of a tax debtor than is an ordinary judgment creditor and if the Government is lax in enforcing its claims, it should not be given a preference over a judgment creditor who has been more diligent in locating and reducing to possession after-acquired property.

It is respectfully submitted, therefore, that in the determination of the issues raised in this appeal this Honorable Court should hold that under the provisions of R. S., Section 3186(a) the lien created thereby is in effect a judgment and a lien against all property owned by the tax debtor at the time said lien arises as provided in said statute; that said lien does not attach to after-acquired property of the tax debtor except by distraint proceedings or a court action commenced by the Government under the statutes pertaining thereto, and that the right of the Government to after-acquired property thus subjected to the Government's claim by such distraint or court proceedings is subject to any and all rights against said property which may be in existence at the time such distraint proceedings or court action is commenced. In the instant case, therefore, it should be determined that the lien of the appellant bank is prior and superior to the lien of the Federal Government arising under the distraint proceedings in 1940 and that the decree in the instant case should provide that the interest of defendant B. Y. Taft in the estate of Mary Eleanor Taft, deceased, should be first applied to the payment of the claim of appellant bank under its execution and that any moneys remaining thereafter should be applied against the Government's claim.

Respectfully submitted,

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